Zoning Board of Adjustment
Roles and Responsibilities

Paul G. Sanderson, Esq.
Local Government Center
April 1, 2006

Introduction

These materials focus on the powers and duties of the Zoning Board of Adjustment, the ZBA. The organization and membership of the ZBA and other important procedural issues are not covered here.

The New Hampshire Supreme Court has described the ZBA as "an essential cog in the entire scheme of a zoning ordinance." *Jaffrey v. Heffernan*, 104 N.H. 249 (1962). The ZBA is a quasi-judicial body, and the task of the members is to exercise good judgment in implementing the ordinance as it is written – not as they think it *should* be written. In doing so, the ZBA conducts public hearings on applications before it; hears evidence and testimony presented to it by applicants, abutting landowners and other interested parties; and weighs the evidence presented against the terms and requirements of the zoning ordinance.

The volunteers who serve on the ZBA must have knowledge of all of the provisions of their local zoning ordinance, and continually educate themselves on the latest developments in the law of zoning. The ZBA must be careful to base its decisions only upon the applicable law and the provisions of the zoning ordinance, not on the popularity of the applicant or the mood of the crowd at the public hearing.

I. Why does a municipality establish a ZBA?

State law requires every municipality to establish a ZBA upon the enactment of a zoning ordinance. See RSA 673:1, IV. This land use board is not optional if a zoning ordinance has been adopted, and a failure to establish and maintain a ZBA can render the entire zoning ordinance invalid. *Jaffrey v. Heffernan, as cited above.*

The right to enjoy property is protected by the New Hampshire Constitution in pt. I, articles 2 and 12. Property rights must be both respected and protected from unreasonable zoning restrictions. The ZBA serves as the "relief valve" that allows the municipality to avoid unnecessary hardship and unfairness in the application of the ordinance to individual parcels of land, and to individual property owners. "Variances are included in

a zoning ordinance to prevent the ordinance from becoming confiscatory or unduly oppressive as applied to individual properties uniquely situated." *Sprague v. Acworth*, 120 N.H. 641, 644 (1980). The ability to review the proposed use of a specific parcel of land, coupled with the authority to adjust the application of land use controls where special conditions exist saves the ordinance from constitutional violation. See *Simplex Technologies v. Town of Newington, 145 NH 727 (2001), and the cases cited in the opinion.*

II. The Jurisdiction of the ZBA

A general rule of New Hampshire municipal law is that towns and cities, and their various boards and committees, have only those powers granted to them by the legislature. *Girard v. Town of Allenstown,* 121 NH 268 (1981). Therefore, the ZBA only has the authority described in state statutes, and cannot act in any other area. For example, while a ZBA can adjudicate an administrative appeal from a decision of the Board of Selectmen to grant a permit, it cannot interfere in the action of the Selectmen to enforce the zoning ordinance. The ZBA can deal with administrative appeals, special exceptions, or variances arising out of cases pending before the Planning Board, but the ZBA cannot interfere with the Planning Board's authority over subdivisions or site plan reviews.

A. RSA 674:33 is the primary source of authority for the ZBA, and gives the ZBA the power to:

- Hear and decide appeals of administrative decisions;
- Grant variances from the terms of the zoning ordinance; and
- Make special exceptions as authorized by the zoning ordinance.

B. RSA 674:33-a authorizes the ZBA to grant equitable waivers of dimensional requirements.

C. RSA 674:41 provides for an appeal to the ZBA when the board of selectmen denies a request to erect a building on a lot that does not have frontage on a road that is:

- Class V or better, or
- Shown on a plat approved by the planning board, or
- Accepted by the legislative body, or
- Class VI or a private road for which the governing body has authorized the issuance of building permits.

RSA 674:41 is a complicated statute, and applying its various provisions usually requires consultation with legal counsel. The criteria used by the ZBA in determining whether to grant an appeal are described in the statute: "Whenever enforcement [of the statute] would entail practical difficulty or unnecessary hardship, and when the circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets[.]" These criteria are vague, and the "unnecessary hardship" analysis is *not* based on the same unnecessary hardship criteria required to determine whether or not to grant a variance. Further consideration of this statute is beyond the scope of these materials, but for more information, see the Local Government Center's 2003 Municipal Law Lecture Series, *Where Road Laws and Zoning Collide: RSA 674:41 and Other Paths Around the Rotary* by Gary Bernier, Esq. and Bernard Campbell, Esq., available at www.nhlgc.org .

D. The ZBA can be designated by the legislative body (town meeting) to hear appeals from provisions of the local building code, unless the code establishes a separate building code board of appeals. If the ZBA is so designated, its authority to hear appeals from decisions of the building inspector is found in RSA 674:34. The ZBA has the power "to vary the application of any provision of the building code to any particular case when, in its opinion, the enforcement of the building code would do manifest injustice and would be contrary to the spirit and purpose of the building code and the public interest."

Note that these provisions apply to the municipality's adopted building code, not the state building code found at RSA 155-A:1 through :12. Further consideration of the issue of building codes is beyond the scope of these materials, but for more information, see the website of the State Building Code Review Board at www.state.nh.us in the Department of Safety.

III. Equitable Waivers of Dimensional Requirements

RSA 674:33-a., allows the ZBA to grant "equitable waivers of dimensional requirements" as a simple remedy for honest mistakes made in the physical layout of a lot or the placement of structures on a lot. The waiver can be granted only for dimensional violations, not for use violations. Dimensional requirements are setbacks, frontage or other physical or mathematical requirements. The violations must exist at the time of the application. To obtain an equitable waiver of dimensional requirements, an applicant has the burden of proof to show that the following four criteria are met:

- The violation was not discovered by the owner, former owner, owner's agent or municipal official until after the structure was substantially completed, or the lot conveyed to a bona fide purchaser.

- The violation was not due to ignorance of the law, failure to inquire, obfuscation, misrepresentation or bad faith, but was a good faith error in

measurement or an error in ordinance interpretation by a municipal official in issuing a permit.

- The violation is not a public or private nuisance, does not diminish the value of property in the area or affect the future uses of other property.

- The cost of correction so far outweighs the public benefit gained by compliance with the dimensional requirements that it would be unfair to require correction.

If the violation has existed for 10 years or more and the municipality has taken no enforcement action in that time, the applicant is not required to prove either of the first two criteria listed.

The grant of an equitable waiver is not viewed as a nonconforming use, and it does not exempt future construction or use from compliance with the zoning ordinance. A landowner cannot use the equitable waiver procedure to seek relief from a dimensional requirement in the future. That type of request is an application for an area (dimensional) variance, and must be reviewed under the criteria established in *Boccia v. City of Portsmouth*, as outlined later in the section on variances.

IV. Appeals of Administrative Decisions

The ZBA has the power to "[h]ear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16[.]" See RSA 674:33, I.

Every application to the ZBA is in one sense an appeal of an administrative decision. A property owner is not adversely affected by the zoning ordinance until an application for subdivision, site review, a building permit, or other form of zoning compliance permit has been denied on the basis that the existing or proposed land use fails to satisfy some criteria contained within the text of the zoning ordinance. The language of the ordinance itself will guide the applicant, the administrative officials of the municipality, and the ZBA as to the type of relief that is required for the change to proceed.

The ZBA has the authority to reverse or affirm any administrative decision in whole or in part. It may "modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken." RSA 674:33, II.

A. Decision of Administrative Official

Who is an administrative official? It is "any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility." RSA 676:5, II(a)

What is a "decision of an administrative officer?" It includes "any decision involving construction, interpretation or application of the terms of the ordinance." RSA 676:5, II(b). So, for example, if the board of selectmen or the administrative official named in the ordinance denies a landowner's request for a building permit because the proposed development does not comply with the terms of the zoning ordinance, the landowner has the right to appeal that decision to the ZBA.

Based on these definitions, it is clear that some zoning "enforcement" decisions can be appealed to the ZBA. Keep in mind, however, that the ZBA cannot hear appeals of the **discretionary** decisions made by administrative officials or boards to begin formal or informal enforcement proceedings. However, appeals can be brought involving the meaning or interpretation of the zoning ordinance or the application of its terms that are implicated in such enforcement proceedings. RSA 676:5, II (b).

What is the difference between discretionary enforcement decisions and interpretations of zoning provisions implicated in enforcement decisions? If the board of selectmen or the code officer makes a mistake or error in applying the terms of the ordinance in the course of making an administrative decision – to issue a building permit, for example – that decision can be appealed to the ZBA. But if the board of selectmen or code officer decides, in its/his/her discretion, not to bring an enforcement action to correct a zoning violation, that decision cannot be appealed to the ZBA.

B. Decision of the Planning Board

RSA 676:5, III permits appeals to the ZBA of planning board decisions made in the exercise of subdivision or site plan review that are based on an interpretation of the terms of the zoning ordinance. There is one exception to this provision. If the zoning ordinance contains an innovative land use control adopted under RSA 674:21 that delegates granting of permits or other administration to the planning board, the planning board's decision may be appealed only to the superior court under RSA 677:15, not to the ZBA.

C. Decision of the Historic District Commission

Decisions of the historic district commission may be appealed to the ZBA as an appeal of an administrative decision. RSA 677:17. In towns without a zoning ordinance and, therefore, without a ZBA, appeals of historic district commission decisions follow the applicable procedures of RSA 677:1 through :14.

V. When Is ZBA Relief Not Required?

1. Preexisting Nonconforming Uses

The terms of a zoning ordinance that prohibit creation of a structure or a use, or impose dimensional standards do not apply to a structure or use lawfully established prior to enactment of the regulation that prohibits that structure or use. See RSA 674:19. These structures or uses are referred to as "grandfathered" or "preexisting nonconforming uses or structures". They do not require ZBA relief in order to continue to the use or the form in existence at the time the ordinance is enacted. For example, in *Morgenstern v. Town of Rye*, 147 N.H.558 (2002), the Court held that a variance is not required to build on a substandard lot when the property owner acquired a vested right to build from the prior owner.

According to RSA 674:19, the zoning ordinance applies to "any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration." That is, nonconforming uses normally cannot be expanded. However, some alteration of preexisting nonconforming uses is permitted without obtaining a variance as long as four criteria established by the New Hampshire Supreme Court are met. They are:

- The expansion is a "natural activity, closely related to the manner in which the piece of property is used" when the ordinance was enacted (the same use modernized through new technology).

- The proposed use is simply a different manner of utilizing the same use, not a use that is different in character, nature or kind.

- The proposed use does not have a substantially different effect on the neighborhood.

- If the nonconformity is of a dimensional requirement, the expansion or change does not render the property proportionally less adequate in relation to the dimensional requirement (setback, frontage, etc.).

See *Hurley v. Hollis*, 143 NH 567 (1999) and *New London Land Use Assn. v. New London ZBA*, 130 NH 510, 516 (1988). Each case must be evaluated on its own facts. Thus, a full discussion of nonconforming uses and vested rights is beyond the scope of these materials, but for more information on this topic see 2002 Municipal Law Lecture # 3 *Grandfathered: Nonconforming Uses and Vested Rights* by H. Bernard Waugh, Esq., available from the Local Government Center (New Hampshire Municipal Association) at 1-800-852-3358 or www.nhlgc.org .

2. Governmental Uses Not Subject to Zoning Ordinances

When there is no statute to the contrary, the state and its political subdivisions – which include towns, cities, village districts, school districts and counties – are not subject to local zoning regulations when the land use involves a governmental function, such as a fire station, school, or a highway. *McGrath v. City of Manchester*, 113 N.H. 355 (1973). Therefore, the state and its political subdivisions are not required to obtain a variance in order to use land or structures in a manner that would otherwise violate the terms of the zoning ordinance when the purpose is to carry out their public health, safety and welfare functions.

These governmental entities must comply with required building codes, life safety codes, and public health laws such as those regulating water sources and sewage disposal. In addition, RSA 674:54 requires the governmental owner to give written notice to the governing body of the municipality of any governmental use of property that constitutes "a substantial change in use or a substantial new use." Under the statute, the municipality, usually the planning board, may hold a public hearing on the proposed governmental use and may issue nonbinding written comments on "the conformity or nonconformity of the proposal with normally applicable land use regulations[.]"

3. Preemption by State or Federal Regulation

State law preempts local regulation when the state has enacted a comprehensive regulatory scheme that would conflict with or be frustrated by local regulation. See, for example, *North Country Environmental Services, Inc. v. Town of Bethlehem*, 150 N.H.606 (2004). Also, federal law may preempt local regulation. See *Koor Communication, Inc. v. City of Lebanon*, 148 N.H. 618 (2002). Preemption can occur in the land use area in the operation of solid waste facilities, location of snowmobile trails on private property, development of community living facilities for developmentally disabled persons, location of hazardous waste sites, location of public utility structures and electricity transmission lines, crushing of stone, pesticide use and other situations.

Even when state law is comprehensive, sometimes it expressly permits additional municipal regulation. For example, several preemption cases have held that a local zoning ordinance was preempted, however the municipality retained site plan review authority. Preemption issues should be discussed with the municipality's regular attorney.

VI. Special Exceptions

RSA 674:33, IV authorizes the ZBA to grant special exceptions in accordance with general and specific rules contained in the zoning ordinance. In other words, the ZBA has the power to grant a special exception only if the zoning ordinance provides for special exceptions for specified uses that meet criteria enumerated in the ordinance. A zoning

ordinance is not required to include provisions for special exceptions, but if it does, the special exception provisions should clearly express land uses that require a special exception and the specific criteria the applicant must meet in order to be granted a special exception.

Applicants and new ZBA members – and judges, for that matter – often find the difference between a special exception and a variance confusing. A variance exempts the property from the strict application of the zoning regulation. A special exception, on the other hand, is a permitted use under the zoning ordinance, as long as certain standards or criteria enumerated in the ordinance are met. The idea is to allow certain uses that may be desirable, although incompatible with other permitted uses in the district, such as funeral homes, gas stations and convenience stores in residential zones, for example. By evaluating the application for a special exception based on the criteria required in the ordinance, the ZBA can determine whether the proposed plan can be implemented without the detrimental effects the ordinance seeks to avoid.

Although a special exception cannot be granted to allow a use that is otherwise not permitted by the zoning ordinance, those land uses covered by special exception are not uses permitted as a matter of right. The burden is on the applicant to provide evidence to the ZBA that he or she meets all of the standards for the special exception listed in the ordinance. The ZBA cannot grant or deny the special exception simply because it likes or dislikes either the proposed use or the applicant. If the applicant shows that the proposal meets all of the criteria listed in the ordinance, the ZBA must grant the special exception. The converse is also true. If the applicant is not able to prove that all the special exception requirements are met, the ZBA must deny the application. See *Tidd v. Town of Alton*, 148 N.H. 424 (2002). In *Tidd* the Court said, "In considering whether to grant a special exception, zoning boards may not vary or waive any of the requirements set forth within the applicable zoning ordinance."

Once granted, a special exception runs with the land, does not expire upon a change in ownership of the land, and it cannot be limited to the current owner of the property. However, the zoning ordinance can provide that the special exception granted must be acted upon within a certain period of time, or that, under certain circumstances, it could be lost by abandonment.

In order to protect the municipality from expansion or change of the use over time, the ZBA does have authority to add conditions to approval of a special exception when the zoning ordinance specifically grants such authority. *Nestor v. Town of Meredith ZBA*, 138 N.H. 632 (1994). The ZBA should be specific and clear in its notice of decision as to exactly what conditions, if any, it is attaching to the grant of a special exception. Since a special exception doesn't expire upon a change in land ownership, the ZBA should condition the approval of any special exception to creation of the specific development plan described in the application. This can be important to later efforts to enforce the terms of the special exception. See, for example, *Town of Rye v. Ciborowski*, 111 NH 77

(1971) where the owner of a private air strip was enjoined from making a more intensive use of the area as a violation of the representations earlier made to a ZBA to achieve grant of a variance.

VII. Variances

A. What Is a Variance?

A variance is sought when a proposed land use fails to meet a requirement imposed upon the land by the zoning ordinance. If granted by the ZBA, a variance is a decision by the ZBA to exempt a specific property from the requirements of the zoning regulation, thereby creating a permitted nonconforming use. A variance "runs with the land", and continues in effect when the land changes ownership, and cannot be limited to a particular duration. The ordinance may provide for the variance to expire if not used within a specific period of time, however, use of the variance within that time period may result in vesting of the property owner's right to continue the nonconforming use. *Wentworth Hotel, Inc. v. New Castle,* 112 N.H. 21 (1972). The benefit of the variance can be lost by abandonment when the evidence shows the landowner's intention to abandon or relinquish the use or if the landowner acts or fails to act in a manner that indicates he or she no longer claims or retains interest in the use. *Lawlor v. Town of Salem,* 116 NH 61 (1976).

No other land use statute has been the source of more litigation than the variance statute – RSA 674:33, I(b) – and New Hampshire has a substantial body of case law regarding variances dating back at least to the early 1950s. However, the analysis of variance cases, particularly with regard to the unnecessary hardship criteria, has undergone two dramatic shifts in the past five years as a result of decisions by the New Hampshire Supreme Court. ZBA members, code enforcement officers and other local officials must understand and apply these changes at the local level.

B. The Five Variance Criteria

The applicant bears the burden of proving to the ZBA through the submission of evidence that all five of the following criteria have been met. If the applicant fails to prove any one or more of the criteria, the variance must be denied.

The five criteria for granting a variance are:

- It will not be contrary to the public interest.
- Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.

- It is consistent with the spirit of the ordinance.
- Substantial justice is done.
- The value of surrounding properties will not be diminished.

1. Not Contrary to the Public Interest

The applicant is not required to prove that his or her application for a variance will benefit the public, but must show only that granting the variance will not do harm. *Gray v. Seidel*, 143 N.H. 327 (1999). Prior cases had supported the notion that granting the variance must benefit the public interest. In assessing whether granting the variance would not be contrary to the public interest, the ZBA must use its collective judgment based on the specific facts of each case.

2. Unnecessary Hardship

The unnecessary hardship element is the most difficult requirement for the variance applicant to meet. The relevant text of the statute is "*if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship[.]*" See RSA 674:33, I (b).

Prior to 2001, an applicant was required to prove that the zoning regulation would deny him or her all reasonable use of the property in question. The uniqueness of the land, rather than the plight of the owner determined whether a hardship existed. *Grey Rocks Land Trust v. Hebron*, 136 NH 239 (1992). In *Simplex Technologies Inc. v. Newington*, 145 NH 727 (2001), the court found that variances had become so hard to achieve under the old standard that the rights of property owners guaranteed by the New Hampshire Constitution and the rights of municipalities to regulate land use had fallen out of balance. A new unnecessary hardship standard was established. Just as local officials were coming to an understanding of the new standard, a second major change in variance law was announced in *Boccia v. City of Portsmouth, 151 NH 85 (2004)*, as the Court adopted a distinction between "use variances" and "area variances". The *Simplex* unnecessary hardship test applies only to use variances, and the *Boccia* unnecessary hardship test applies only to area variances.

New Hampshire law did not recognize a distinction between a "use variance" and an "area variance" prior to 2004. See *Ouimette v. City of Somersworth*, 119 N.H. 292 (1979). Justices Duggan and Dalianis explained the difference between use and area variances in a concurring opinion in the case of *Bacon v. Town of Enfield*, 150 N.H. 468 (2004) Use variances, they wrote, "pose a greater threat to the integrity of the zoning scheme" than area variances. Use variances interfere with zoning's "segregation of land according to uses," while area variances relax limits on a use that is permitted by the zoning ordinance.

The *Boccia* case incorporated this distinction into New Hampshire law. A use variance "allows the applicant to undertake a use which the zoning ordinance prohibits[.]"An area variance, also referred to as a dimensional variance, "authorizes deviations from restrictions which relate to a permitted use." Area variances relate to physical or dimensional requirements, such as frontage, setbacks, height of buildings, extent of lot coverage and the like.

a. Use Variance

An applicant for a use variance must prove:

- A zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment;

- No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and

- The variance would not injure the public or private rights of others.

Considerable debate, including among Supreme Court justices, has occurred over how to interpret this language. In *Rancourt v. City of Manchester*, 149 N.H. 51 (2003), the Court found that a zoning ordinance precluding horses from the R-1A district (a low-density residential zone) "interfered with the [owners'] reasonable proposed use of their property, considering its unique setting." The keeping of livestock was not permitted in that residential zone, and abutters had argued there were no "special conditions" warranting the granting of a variance. The Court said:

"Whereas before *Simplex*, hardship existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned …, after *Simplex*, hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable.'"

What are "special conditions?" In the first prong of the *Simplex* test, the former term 'special conditions' has become the property's 'unique setting … in its environment." This is where the specific facts of the case come in to play. In analyzing "special conditions" and the property's "unique setting," the Court pointed to the following factors:

- The owner's three-acre lot is larger than most surrounding lots.

- The lot is uniquely configured in that the rear portion of the lot, which is where the barn is to be built, is larger than the front of the lot.

- There is a "thick, wooded buffer" around the paddock area.

- The area where the horses are to be kept is 1½ acres, which is more land than the zoning ordinance requires for keeping two livestock animals in other districts in the city.

The Court said these factors are the "special conditions" that make it reasonable for the owner to have a barn and two horses on their residential lot "considering its unique setting." The rule from *Rancourt* is that "hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable.'"

There are two other requirements contained in the *Simplex test:*

- The zoning regulation must bear a "fair and substantial relationship" to the purpose of the ordinance. The ZBA must consider the reasons for the regulation – the purposes the ordinance was designed to serve- and determine whether those purposes are fairly and substantially served by the regulation when it is applied to the parcel in question; and

- Whether the variance would injure the public or private rights of others. The ZBA should consider the rights of other property owners and the public at large when determining whether the hardship of complying with the zoning ordinance is unnecessary. Will the variance result in a public or private nuisance?

The applicant must prove each of the three prongs of the *Simplex* unnecessary hardship standard discussed above before a use variance may be granted.

b. Area Variance

In the *Boccia v. City of Portsmouth* case, a majority of the Court agreed to a separate analysis for use and area variances because "the existing *Simplex* hardship test lacks factors specifically relevant to area variances."

In *Boccia*, the applicant wanted to build a 100-room hotel on seven acres. As proposed, the hotel would violate six setback (dimensional) requirements. The applicant applied for six area variances, which the ZBA granted. Abutters appealed the decision. The Court adopted a new test for this type of request:

> Factors that should be considered in the area variance hardship calculation include: (1) whether an area variance is needed to *enable* the applicant's proposed use of the property given the special conditions of the property; and (2) whether the benefit sought by the applicant can be achieved by some other method

reasonably feasible for the applicant to pursue, other than an area variance. This second factor includes consideration of whether the variance is necessary to avoid an undue financial burden on the owner.

Since the ZBA and the superior court applied the *Simplex* unnecessary hardship test, the Court remanded the case to the superior court to determine whether the applicant's variance requests meet the new *Boccia* factors for unnecessary hardship for area variances.

ZBA members must now apply the *Boccia* factors to all applications for area variances. The first factor still requires an analysis of the facts of each application to determine "the special conditions of the property." In *Boccia*, there were wetlands on the property and the lot was narrow in shape. These factors apparently made it impossible for the applicant's plan **as designed** (100-room hotel) to comply with the city's setback requirements. So, under the first factor, the ZBA should determine whether "special conditions of the property" make an area variance necessary to enable the proposed use (100-room hotel). The existence of "special conditions of the property" is essential to determining whether an area variance is necessary to enable the proposed use.

The second factor focuses on whether there is another reasonably feasible way for the applicant to achieve the same benefit (a 100-room hotel) in the absence of a variance without undue financial burden. This factor entails consideration of a different design – perhaps a taller and narrower building, underground parking instead of above ground, or other alternative configurations. If the benefit sought by the applicant can be achieved by some reasonable alternative, then a variance is not needed to *enable* the proposed (permitted) use. It is not appropriate to consider, for example, a 60-room hotel as a reasonably feasible alternative.

c. Use v. Area Variance: How to Tell the Difference

It is not always readily apparent which type of variance applies to a given set of facts. The Court dealt with this issue in *Harrington v. Town of Warner*, No. 2003-687, April 4, 2005.

The applicant owned a 46-acre parcel in a medium density residential zone in which manufactured housing parks were permitted. There were 33 manufactured home sites and 54 campground sites located on 26 acres of the property. The owner wanted to add 26 manufactured home sites on the remaining 20 acres.

Under the zoning ordinance, a minimum of 10 acres was required for manufactured housing parks, and the number of home sites was limited to 25 in each park. Town officials were uncertain whether the ordinance should be interpreted to limit the number of sites to 25 per 10 acres, or 25 regardless of the size of the parcel as long as the parcel was at least 10 acres. Because the parcel lacked required road frontage, the property

owner was unable to subdivide it, which would have given him two additional 10-acre parcels on which he could locate 25 sites each. Therefore, he applied for a variance.

The zoning board of adjustment granted the variance, but limited the number of additional sites to 25, to be developed at no more than five sites per year. The abutters, the Harringtons, appealed to the superior court, which affirmed the ZBA's decision, and then appealed to the Supreme Court, arguing that the applicant failed to show unnecessary hardship; created his own financial hardship because he purchased the property with knowledge of the zoning restrictions; and failed to prove other variance criteria, including that the variance was consistent with the spirit and intent of the zoning ordinance and that granting the variance would do substantial justice.

Distinguishing between a use or area variance didn't matter until the Court's decision in *Boccia*. Here, the ZBA granted the variance before *Boccia* was decided and had applied the *Simplex* test. However, the case reached the Supreme Court after *Boccia* was decided, and the Court began its analysis by first determining whether the request was for a use or area variance, and which unnecessary hardship test to apply – the *Boccia* factors or the *Simplex* test.

"A use variance allows the landowner to engage in a use of the land that the zoning ordinance prohibits," the Court wrote, while "[a]n area variance is generally made necessary by the physical characteristics of the lot. In contrast to a use variance, an area variance involves a use permitted by the zoning ordinance but grants the landowner an exception from strict compliance with physical standards such as setbacks, frontage requirements, height limitations and lot size restrictions. As such an area variance does not alter the character of the surrounding area as much as a use not permitted by the zoning ordinance."

The Court said, "The critical distinction between area and use variances is whether the purpose of the particular zoning restriction is to preserve the character of the surrounding area and is thus a use restriction. If the purpose of the restriction is to place incidental physical limitations on an otherwise permitted use, it is an area restriction. Whether the variance sought is an area or use variance requires a case-by-case determination based upon the language and purpose of the particular zoning restriction at issue."

The Court compared the manufactured housing park provision to another provision of the ordinance that permitted manufactured housing subdivisions on a minimum 12-acre lot. According to that provision, the maximum number of lots "in any manufactured housing subdivision shall not exceed 25." The Court emphasized the word "any" in this provision and interpreted it to mean that regardless of the size of a parcel, as long as it was a minimum of 12 acres, it was limited to 25 manufactured housing sites. "Thus, unlike an area restriction, the limitation on the number of manufactured housing sites is not related to the acreage or other physical attributes of the property," the Court wrote. "Rather, the restriction limits the intensity of the use in order to preserve the character of the area."

In fact, the Court added, the town's overall zoning scheme, with three residential districts, segregates land by types of uses as well as by intensity of use. For example, two-family dwellings were permitted uses in the village and medium density districts, but permitted only by special exception in the low-density district. "[G]iven the language and purpose of the zoning ordinance," the Court concluded that "the provision limiting the number of sites to 25 lots is a use restriction."

The Court then applied the *Simplex* unnecessary hardship factors, and affirmed the grant of the variance. The fact that manufactured housing parks were a permitted use in the zoning district was "most significant" in supporting the conclusion that the 25-site limit per parcel interfered with the applicant's reasonable use of the property. Evidence supporting the conclusion that unique conditions of the property created a hardship included the fact that the applicant could not subdivide the parcel because of insufficient road frontage; the current location of the existing mobile homes, campground sites and swamp land made construction of a road with sufficient frontage "almost impossible;" and improvements to the park's private road would not remedy the road frontage problem. The ZBA implicitly found that the expansion of the park would not adversely affect the character of the area.

The abutters had also argued that because the zoning regulation was in place before the applicant purchased the property, any hardship experienced was self-created. The Court cited its previous decision in *Hill v. Town of Chester*, 146 N.H. 291 (2001), which held that "purchase with knowledge" of the zoning restrictions does not preclude the landowner from obtaining a variance, but should be a factor considered under the first prong of the *Simplex* test. Here, the applicant was advised in writing by the selectmen before purchasing the property that the mobile home park could be expanded subject to planning board approval and compliance with the building code. Also, the ZBA was uncertain whether the 25-site limitation for mobile home parks applied per 10 acres or was an absolute maximum and, therefore, the applicant acted in good faith in applying for a variance.

d. Reasonableness

While the intellectual debate among Supreme Court justices over the meaning of unnecessary hardship in the context of constitutional and administrative law is fascinating, ZBA members may find the Court's complex tests and decisions rather frustrating in the real world of variance applications. However, signs of further debate within the Court are evident, including over the issue of a landowner's **"reasonable" use** of his or her property.

In *Bacon* and again in *Shopland v. Town of Enfield* (decided July 15, 2004), Justice Nadeau dissented vigorously from the concept of distinct unnecessary hardship tests for use and area variances. In both cases, he said the reasoning behind *Simplex* was, as he

wrote in *Shopland*, an approach that was "more considerate of the constitutional right to enjoy property." In *Bacon*, he wrote, "Once applicants make that showing [that the use for which they seek a variance is reasonable considering the property's unique setting in its environment], their proposals are entitled to deference. Indeed, safeguarding the constitutional rights of landowners requires that we afford their proposed reasonable uses some modicum of deference."

However, in *Bacon*, Justices Duggan and Dalianis wrote, "*Simplex*, however, did not purport to establish a rule of reasonableness for granting variances. … Even under the *Simplex* standard, merely demonstrating that a proposed use is a 'reasonable use' is insufficient to override a zoning ordinance. Such a broad reading of *Simplex* would undermine the power of local communities to regulate land use. Variances are, and remain, the exception to otherwise valid land use regulations."

The issue of "reasonableness" was raised again in *Vigeant v. Town of Hudson*, (decided February 23, 2005). The ZBA denied a variance request for a five-unit multifamily dwelling on a 1.6-acre parcel in a business district in which multifamily housing was a permitted use. The ordinance required a 50-foot setback from the road, and the applicant sought a variance to permit construction 30 feet from the road. The trial court vacated the ZBA decision, and the ZBA appealed to the Supreme Court. Both the ZBA and the trial court based their decisions on the *Simplex* unnecessary hardship test, but before the case reached the Supreme Court, the *Boccia* unnecessary hardship test for area variances was established.

Both the ZBA and the applicant sought guidance from the Court on how to apply the *Boccia* unnecessary hardship factors. The town questioned whether the reasonableness of the proposed use is to be taken into consideration. In denying the applicant's variance request for a five-unit multifamily dwelling, the ZBA had granted a variance for a two-unit dwelling, suggesting that a two-unit dwelling was a more reasonable use of the parcel than a five-unit dwelling. However, the Court wrote, "We hold that it is implicit under the first factor of the *Boccia* test that the proposed use must be reasonable. When an area variance is sought, the proposed project is presumed to be reasonable if it is a permitted use under the town's applicable zoning ordinance." The Court added, "If the use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use of the property."

The issue for the Court was not whether the proposed use was reasonable, but whether, given the property's unique setting in its environment, the plaintiff had shown that a setback variance was necessary to enable him to build five multifamily dwelling units. Given the shape of the lot and the setback requirements from the road, as well as from wetlands on the property, the Court concluded the applicant had met both of the *Boccia* factors for unnecessary hardship for an area variance. The Court held that "special conditions of the property make it impossible to comply with the setback requirements.

From a practical standpoint, an area variance is necessary to implement the proposed plan."

Further litigation involving the issue of reasonableness in the context of area variances is likely, despite the Court's statement in *Vigeant* that a proposed use is presumed reasonable in area variance cases if it is a permitted use under the zoning ordinance.

3. Consistent With the Spirit of the Ordinance

Even though most variance requests will focus on the "unnecessary hardship" element, the ZBA cannot grant a variance unless all five criteria are met.

Element 3 requires the ZBA to consider the purpose of the zoning regulation when determining whether a variance would be consistent with the spirit of the ordinance. What effect would granting the variance have on the purposes and goals of the zoning ordinance?

In *Bacon*, the ZBA denied a request for an area variance to allow the property owner to construct a 4- by 5½-foot shed attached to her home to house a boiler so that she could convert the home's heating system from wood and electricity to propane gas. The shed was located within the 50-foot setback from Crystal Lake. Under the zoning ordinance, structures are prohibited within the 50-foot setback without a variance. The home was a pre-existing nonconforming use, but the town required a variance for any addition to the footprint within the 50-foot setback.

The ZBA denied the variance on three grounds: no showing of unnecessary hardship; contrary to the spirit of the zoning ordinance; and not in the public interest. The trial court upheld the ZBA's decision and on appeal the Supreme Court noted that in order for the trial court's decision to be affirmed "we need only find that the court did not err in its review concerning at least one of these factors." With Justices Duggan and Dalianis advocating for a separate unnecessary hardship test for area variances and Justices Nadeau and Brock arguing that unnecessary hardship had been proven under *Simplex*, Chief Justice Broderick wrote in the Court's lead opinion (Duggan and Dalianis concurring in the result), "While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and overdevelopment could be inconsistent with the spirit of the ordinance."

4. Substantial Justice Is Done

This element requires a determination that denial of the request will cause the applicant to suffer a loss that is outweighed by a gain to the general public. That is, denial of the

request would cause the applicant to suffer an injustice. Board members must consider the specific facts of each case in weighing individual loss and public gain.

5. Value of Surrounding Property Will Not Be Diminished

The applicant must present evidence to show that granting the variance will not cause the value of surrounding properties to be lowered. Abutters and other interested parties may present evidence to the contrary. One side or another may present the testimony of property appraisers or other experts. Board members can give whatever weight they determine proper to this evidence and are not bound to accept the conclusions of experts. Members may also consider their own personal knowledge regarding traffic conditions and other relevant information. *Vannah v. Bedford,* 111 N.H. 105.

D. Exception for Disability

RSA 674:33, V gives the ZBA the authority to grant a variance without applying the five variance criteria in situations "when reasonable accommodations are necessary to allow a person or persons with recognized physical disability to reside in or regularly use the premises[.]" Such a variance must be "in harmony with the general purpose and intent of the zoning ordinance." Further, the statute allows the ZBA to limit the term of the variance to "only so long as the particular person has continuing need to use the premises."

E. Attaching Conditions to Grant of Variance

It is within the authority of the ZBA to attach conditions to the grant of a variance. *Healey v. Town of New Durham ZBA*, 140 N.H. 232 (1995). This authority is found in RSA 674:33, II, which enables the ZBA to "make such order or decision as ought to be made" in approving variances. Conditions must be reasonable, however, and will generally be upheld unless they are unreasonable or beyond the ZBA's authority. *Vlahos Realty Co., Inc. v. Little Boar's Head District*, 101 N.H. 460 (1957). Conditions should be in writing and in detail to avoid future enforcement problems.

The ZBA should consider attaching a time limit condition to the grant of a variance so that the variance will expire if substantial development of the use granted by the variance has not begun in a reasonable time – for example, 12 months. The New Hampshire Supreme Court has upheld the authority of the ZBA to condition the use of the variance on a specific time period, noting that use of the variance within that time period may result in vesting. *Wentworth Hotel, Inc. v. New Castle*, 112 N.H. 21 (1972).

The Court has held that the ZBA has jurisdiction over a request from a property owner to modify conditions attached to the grant of a variance. *Old Street Barn, LLC. v. Town of Peterborough*, 147 N.H. 254 (2001). The Court pointed out that RSA 674:33 grants the ZBA authority to modify administrative decisions upon appeal.

Variance Criteria

I. The variance will not be contrary to the public interest.

II. Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.

A. Applicant seeking use variance – *Simplex* analysis

1. The zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment.

2. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property.

3. The variance would not injure the public or private rights of others.

B. Applicant seeking area variance – *Boccia* analysis

1. An area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.

2. The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

III. The variance is consistent with the spirit of the ordinance.

IV. Substantial justice is done.

V. The value of surrounding properties will not be diminished.

From: *Boccia v. City of Portsmouth,* 151 N.H. 85 (2004)